(2)

Supreme Court, U.S.
FILED
MAY 6 - 2005
OFFICE OF THE CLERK

No. 04-1179

IN THE

Supreme Court of the United States

INTEGRATED TELECOM EXPRESS, INC. AND THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS,

Petitioners,

v.

NMSBPCSLDHB, L.P.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

SETH P. WAXMAN
Counsel of Record
CRAIG GOLDBLATT
CHRISTOPHER J. MEADE
DANIELLE SPINELLI
BRENT BICKLEY
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

QUESTION PRESENTED

Whether the court of appeals properly concluded, after conducting a "fact intensive inquiry," that a debtor failed to meet its burden of establishing that a Chapter 11 petition was filed in good faith when the debtor was financially healthy, with no intention of reorganizing or liquidating; with no reasonable expectation that Chapter 11 proceedings would maximize the value of the debtor's estate; and solely to take advantage of a provision in the Bankruptcy Code that limits claims on long-term leases.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

ARGUMENT 6

I. There Is No Division Of Authority Within The Courts Of Appeals 6

II. The Third Circuit Applied A Settled Standard To A Unique Set Of Facts 10

III. The Decision Below Is Correct 11

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Page(s)

Baker v. *Latham Sparrowbush Associates (In re Cohoes Industrial Terminal, Inc.)*, 931 F.2d 222 (2d Cir. 1991) 13

Bank of America National Trust & Savings Ass'n v. *203 North Lasalle Street Partnership*, 526 U.S. 434 (1999) 11

Carolin Corp. v. *Miller*, 886 F.2d 693 (4th Cir. 1989) 9

Connell v. *Coastal Cable T.V., Inc. (In re Coastal Cable T.V., Inc.)*, 709 F.2d 762 (1st Cir. 1991) 13

First National Bank of Sioux City v. *Kerr (In re Kerr)*, 908 F.2d 400 (8th Cir. 1990) 10

Furness v. *Lilienfield*, 35 B.R. 1006 (D. Md. 1983) 11

Humble Place Joint Venture v. *Foray (In re Humble Place Joint Venture)*, 936 F.2d 814 (5th Cir. 1991) 10

In re Madison Hotel Associates, 749 F.2d 410 (7th Cir. 1984) 9

In re SGL Carbon Corp., 200 F.3d 154 (3d Cir. 1999) 7, 10, 11, 12

Laguna Associates Ltd. Partnership v. *Aetna Casualty & Surety Co. (In re Laguna Associates Ltd.)*, 30 F.3d 734 (6th Cir. 1994) 10

Little Creek Development Co. v. *Commonwealth Mortgage Corp. (In re Little Creek Development Co.)*, 779 F.2d 1068 (5th Cir. 1986) 9

Marsch v. *Marsch (In re Marsch)*, 36 F.3d 825 (9th Cir. 1994) 10

Phoenix Piccadilly, Ltd. v. *Life Insurance Co. (In re Phoenix Piccadilly, Ltd.)*, 849 F.2d 1393 (11th Cir. 1988) 10

Platinum Capital, Inc. v. *Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.)*, 314 F.3d 1070 (9th Cir. 2002) 6, 7, 8, 9

Toibb v. *Radloff*, 501 U.S. 157 (1991) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Trident Associates Ltd. Partnership v. *Metropolitan Life Insurance Co. (In re Trident Associates Ltd. Partnership)*, 52 F.3d 127 (6th Cir. 1995) 10

Westbrook v. *Albany Partners Ltd. (In re Albany Partners Ltd.)*, 749 F.2d 670 (11th Cir. 1984) 9

STATUTES

11 U.S.C. § 502(b)(6) 2

11 U.S.C. § 1112(b) 4, 10

11 U.S.C. § 1129(a)(3) 10

LEGISLATIVE MATERIALS

H.R. Rep. No. 95-595 (1977) 11

OTHER AUTHORITIES

7 *Collier on Bankruptcy* § 1112.07 (Lawrence P. King ed., 15th ed. rev. 1996) 10

IN THE

Supreme Court of the United States

No. 04-1179

INTEGRATED TELECOM EXPRESS, INC. AND THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS,
Petitioners,

v.

NMSBPCSLDHB, L.P.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

Petitioner Integrated Telecom Express, Inc. (the "Debtor") filed for bankruptcy protection under Chapter 11 despite holding over $100 million in cash and having no significant debts other than the $26 million it owed to the Respondent, NMSBPCSLDHB, L.P. (the "Landlord"), for damages relating to the termination of a lease. The Debtor filed its bankruptcy petition not in order to accomplish any legitimate bankruptcy purpose, such as to reorganize, to liquidate, or to maximize value for the benefit of its creditors. Rather, as indicated by the Debtor's own Board minutes—which the Court of Appeals described as a "smoking gun"—the Debtor filed for bankruptcy for the sole purpose of frustrating the Landlord's claim, by seeking to take advantage of a provision of the Bankruptcy Code that caps a landlord's damages claim. On these extreme facts, the Court of Appeals properly concluded that the filing served no legitimate

bankruptcy purpose, and therefore directed that the bankruptcy case be dismissed. Accordingly, the case involves a straightforward—and manifestly correct—application of the "good faith" doctrine to the peculiar facts of this case. There is no division of authority in the lower courts and no issue warranting this Court's review is presented. The petition should be denied.

STATEMENT OF THE CASE

1. The Debtor's business model was to supply equipment to the broadband communications industry, and it raised approximately $110 million in cash in August 2000 in an initial public offering. Pet. App. 46a. In the same time period, the Debtor negotiated a lease of real property at 400 Race Street, San Jose, California, with Granum Holdings, predecessor in interest to the Landlord, NMSBPCSLDHB, L.P. *Id.* at 47a. Thereafter, the market for communications equipment collapsed, and the Debtor decided to dissolve under state law. At the time, the Debtor had approximately $117 million in cash, and its only significant debt was the lease it had signed with Respondent. On April 18, 2002, the Debtor's Board of Directors approved a Plan of Complete Liquidation and Dissolution under Delaware law. *Id.* at 48a.

Having pursued state-law dissolution for nearly four months, the Debtor's Board of Directors abruptly changed its course after an August 13, 2002, meeting with bankruptcy counsel. Pet. App. 48a. The Board minutes reflect that the meeting was called for the sole purpose of discussing whether to file bankruptcy to cap the Landlord's claim under § 502(b)(6) of the Bankruptcy Code. The minutes state that "the landlord did not appear to believe that the Company would seriously consider making a bankruptcy filing." *Id.* at 5a. They continue:

> After additional discussion, the Board approved the following resolutions:
>
> RESOLVED: That the officers of the Company are, and each of them hereby is, authorized and directed to send the landlord the letter prepared by

> Murray and Murray in substantially the form reviewed with the Board.
>
> RESOLVED FURTHER: That the officers of the Company are, and each of them hereby is, authorized and directed to negotiate a settlement with the landlord up to a maximum settlement amount of $7 million.
>
> RESOLVED FURTHER: That the Board hereby appoints [Peter Courture and David Lam, and each of them, to] a special committee (the "Committee") that is hereby empowered on behalf of the Board to authorize the officers of the Company to enter into a settlement with the landlord up to a maximum settlement amount of $8 million.
>
> RESOLVED FURTHER: That the officers of the Company shall be required to seek approval from the Board prior to entering into an [sic] settlement with the landlord in excess of $8 million.
>
> ....
>
> RESOLVED FURTHER: *That if the landlord is not willing to enter into a settlement agreement with a maximum amount of $8 million, then the officers of the Company shall be, and each of them hereby is, authorized and empowered on behalf of, and in the name of, the Company to execute and verify or certify a petition under Chapter 11 of the Bankruptcy Code* and to cause the same to be filed in the appropriate United States Bankruptcy Court (the "Bankruptcy Court") at such time as said authorized officer executing the same shall determine.

Pet. App. 6a-7a. (emphasis added). The minutes thus set up a simple if-then clause: "*if* the landlord is not willing to enter into a settlement agreement with a maximum amount of $8 million, *then* the officers of the Company shall be ... authorized and empowered on behalf of ... the Company to execute and verify or certify a petition under Chapter 11 of the Bankruptcy Code." *Id.* at 7a. (emphasis added). The minutes discuss no other reason for the filing.

Two days later, on August 15, 2002, the Debtor's bankruptcy counsel sent a letter to the Landlord threatening to file for bankruptcy if the Landlord did not agree to greatly reduce its claim. Pet. App. 7a-8a. The letter said that the Landlord's claim would be subject to the § 502(b)(6) cap in bankruptcy and indicated that if the Landlord refused to settle, the Debtor would file for bankruptcy, which would result in a reduction in the Landlord's claim. *Id.* at 8a-9a.

The Landlord did not agree to settle. On October 8, 2002, the company filed for bankruptcy under Chapter 11. At the time it filed its petition, the Debtor had $105.4 million *in cash* and other assets worth approximately $1.5 million. Pet. App. 9a. The present discounted value of the remaining lease obligations to the Landlord, which represented the Debtor's only significant indebtedness, was approximately $26 million. The Debtor's other liabilities came to approximately $430,000. *Id.* [1]

2. The Landlord moved to dismiss the bankruptcy case on October 28, 2002, arguing that the Debtor had filed its petition in bad faith, in violation of 11 U.S.C. § 1112(b). Pet. App. 10a. The bankruptcy court held an evidentiary hearing on the motion on January 8, 2003. At the hearing, the Debtor contended that its effort to threaten the Landlord, which was detailed in the Board minutes, was not actually the only reason it sought to file for bankruptcy. The bankruptcy court expressly declined to consider whether the Debtor's post hoc justifications provided a good faith basis for proceeding in bankruptcy; instead, the bankruptcy court

---

[1] The Debtor's only other potential liability related to a securities class-action lawsuit in which the Debtor has been named as a defendant. The Debtor has represented to the SEC and its shareholders that this lawsuit is without merit:

> The company believes that the claims against it are without merit and intends to defend this lawsuit vigorously. While the outcome of these claims is currently not determinable, the Company does not expect that the ultimate costs to resolve these claims will have a material adverse effect on the Company's financial position, results of operations or cash flows.

Pet. App. 31a.

went on to hold as a matter of law that the filing of a Chapter 11 petition for the sole purpose of capping a Landlord's claim did not constitute bad faith. *Id.* at 10a, 64a. On April 7, 2003, the bankruptcy court held a confirmation hearing. The order confirming the plan was entered on April 16, 2003. *Id.* at 13a.

3. The Landlord appealed to the United States District Court for the District of Delaware, which affirmed the Bankruptcy Court's order on May 19, 2004. Pet. App. 43a-60a. In doing so, the District Court expressly declined to engage in a *de novo* review of the Bankruptcy Court's legal conclusion, instead applying an abuse-of-discretion standard. *Id.* at 53a-54a & n.11.

4. The Court of Appeals for the Third Circuit reversed. Pet. App. 1a-42a. As it explained, "[t]he failure of Integrated's business did not subject the company to any pressure on the value of its assets that could be reduced or avoided in an orderly liquidation under Chapter 11." *Id.* at 30a. Pointing out that "a petition must do more than merely invoke some distributional mechanism" (*id.* at 41a), the Court of Appeals concluded that Debtor had not demonstrated an intent to reorganize or liquidate.

The Court of Appeals then examined the question of whether Debtor had satisfied its good faith obligation simply by attempting to take advantage of the § 502(b)(6) landlord cap. Recognizing the board resolution that authorized the letter threatening the Landlord as a "smoking gun" (Pet. App. 41a), the Court of Appeals concluded that the Debtor was using § 502(b)(6) not for any legitimate bankruptcy purpose, but rather as a litigation tactic. Therefore, based on its conclusions "on the facts of this case" (*id.* at 3a), that Petitioner had no legitimate bankruptcy purpose for filing under Chapter 11, and in fact that it filed solely as a litigation tactic, the court held that Integrated had not met its burden of demonstrating good faith, and that its bankruptcy petition should be dismissed.

Petitioner filed a petition for panel rehearing and rehearing en banc. The Court of Appeals denied the petitions.

Pet. App. 76a-77a. Dissenting from the denial of rehearing en banc, Judges Ambro and Rendell stated that they would hear the case en banc "not because we believe that the panel has necessarily reached the wrong result," on the "unique facts this case presents," but rather because some of the opinion's language may be misconstrued to extend the good faith requirement further than the panel intended—which the dissenters believed was limited to this case's "snow in August facts." *Id.* at 78a.

ARGUMENT

This case involves an extraordinary—and extraordinarily unusual—set of facts. The Debtor was not only solvent, but suffering no financial distress; it could easily have satisfied all the claims against it in full. The Debtor filed with no intention of either reorganizing or liquidating as a going concern—indeed, when the Debtor filed for bankruptcy it was little more than a pile of cash to be distributed to creditors and shareholders. And the Debtor filed for bankruptcy solely in order to cap the Landlord's claim against it and thereby enrich the Debtors' equityholders. *See* Pet. App. 2a-3a.

Under these circumstances, the Court of Appeals' determination that the Debtors' filing was not in good faith is nothing more than a routine, factbound—and clearly correct—application of the good-faith doctrine. Indeed, even the two Third Circuit judges who dissented from the denial of rehearing en banc agreed that the panel had reached the correct result on these "snow in August facts." Pet. App. 78a. Because no circuit split exists, the case represents the application of a well-settled doctrine to an extreme set of facts, and the decision below was correct on the merits, this case does not warrant this Court's review.

I. THERE IS NO DIVISION OF AUTHORITY WITHIN THE COURTS OF APPEALS

Petitioner argues that *Platinum Capital, Inc.* v. *Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.)*, 314 F.3d 1070 (9th Cir. 2002) is "analytically indistinguishable" from this

case, and thus that the Third Circuit's decision creates a circuit split with the Ninth Circuit. Pet. 14. This argument misrepresents the facts and holding of *Sylmar Plaza*, which is readily distinguishable from this case.

It is well-settled—and both the Third Circuit below and the Ninth Circuit's decision in *Sylmar Plaza* held—that a bankruptcy petition is in good faith only if, on the particular facts of the case, there was a proper bankruptcy purpose for the filing. *See* Pet. App. 18a-20a; *Sylmar Plaza*, 314 F.3d at 1074 (good faith inquiry turns on whether the action "achieves a result consistent with the objectives and purposes of the Code"). "Whether the good faith requirement has been satisfied is a 'fact intensive inquiry' in which the court must examine 'the totality of facts and circumstances' and determine where a 'petition falls along the spectrum ranging from the clearly acceptable to the patently abusive.'" Pet. App. 17a-18a (quoting *In re SGL Carbon Corp.*, 200 F.3d 154, 162 (3d Cir. 1999)); *accord Sylmar Plaza*, 314 F.3d at 1074 ("The . . . good faith determination is based on the totality of the circumstances.").

Thus, both the Third Circuit below and the Ninth Circuit in *Sylmar Plaza* applied the same test for good faith, in light of the "totality of the circumstances" in each case. And the outcome of the two cases differed *not* because the two circuits applied different legal standards, but simply because the "totality of the circumstances" in the two cases mandated different results.

Two critical features of *Sylmar Plaza* distinguish it from this case: the debtor (although technically solvent) was in financial distress; and it sought to liquidate assets in Chapter 11 so as to maximize the value to the estate. As the Third Circuit explained, the holding in *Sylmar Plaza* "cannot be divorced from the facts of that case, which reveal that the Bankruptcy Code was used to maximize value for creditors as a whole." Pet. App. 29a; *see also id.* at 27a (noting that "[t]he absence of any financial distress facing [the Debtor] distinguishes" *Sylmar Plaza* from this case). Specifically, in *Sylmar Plaza* the debtors owned a shopping center that was subject to a secured bank loan. The debtors

"encountered cash flow problems" and defaulted on the loan. *Sylmar Plaza*, 314 F.3d at 1072-1073. By filing for bankruptcy, the debtors were able to sell the shopping center free and clear of the bank lien, thereby realizing a higher value than would have been possible outside of bankruptcy.[2] *Id.* at 1073.

Based on the totality of the circumstances, the Ninth Circuit held that the debtor's filing in *Sylmar Plaza* had a proper bankruptcy purpose, rejecting the creditor's argument that a petition filed in order to take advantage of a particular beneficial provision of the Bankruptcy Code was *per se* in bad faith. *See* 314 F.3d at 1075.

The proper bankruptcy purpose present in *Sylmar Plaza* is utterly lacking in the present case. The Debtor here was in no financial distress of the sort experienced by the debtor in *Sylmar Plaza*; indeed, it "was highly solvent and cash rich at the time of the bankruptcy filing." Pet. App. 29a. And, because the Debtor was merely a pile of cash at the time of the bankruptcy filing, the filing did nothing to maximize value for the estate. *Id.* at 30a. Rather, the sole purpose of the filing was to cap the Landlord's claim for the benefit of Debtor's equityholders.

Petitioners gloss over this essential distinction and focus instead on the idea that the debtor in both cases sought to take advantage of a Code provision. Petitioners thus contend that *Sylmar Plaza*'s statement that filing in order to take advantage of a provision of the Bankruptcy Code is not *per se* in *bad* faith conflicts with the Third Circuit's statement that filing in order to take advantage of a Bankruptcy Code provision is not *per se* in *good* faith. Pet. 17 & n.9. But merely stating this supposed conflict demonstrates that

---

[2] Petitioners contend that the sale in *Sylmar Plaza* generated value only for equity holders and not for creditors. Pet. 16. The point, however, is that the sale of the shopping center free and clear of the lien generated value for the estate that could not have been realized outside of bankruptcy—and maximizing value for the estate of a financially distressed debtor is a bankruptcy-related purpose not present in this case, where the financially healthy Debtor's assets consisted of cash that passed through the bankruptcy unchanged in value.

there is no conflict at all: because *every* debtor files with the desire to take advantage of a Bankruptcy Code provision, that desire cannot by itself establish either bad faith or good faith. Rather, as both the Third Circuit and the Ninth Circuit recognized, the court must examine the totality of the circumstances to determine whether the petition was filed for a valid bankruptcy purpose. Here, and unlike in *Sylmar Plaza*, the debtor lacked such a purpose; it therefore did not meet its burden of demonstrating that the filing was in good faith.

Petitioner also contends that general confusion and varying standards currently exist among the circuits; this, however, is an attempt to manufacture a circuit split where none exists. While the exact phraseology may sometimes differ, the courts of appeals, in fact, apply the same analysis that the Third Circuit used in this case: whether the debtor's filing was consistent with the underlying purposes of the Bankruptcy Code. *See, e.g., Sylmar Plaza*, 314 F.3d at 1074 (good faith inquiry turns on whether the action "achieve[s] a result consistent with the objectives and purposes of the Bankruptcy Code"); *Carolin Corp.* v. *Miller*, 886 F.2d 693, 698 (4th Cir. 1989) (concluding that the good faith requirement is "indispensable to proper accomplishment of the basic purposes of Chapter 11 protection"); *Little Creek Dev. Co.* v. *Commonwealth Mort. Corp. (In re Little Creek Dev. Co.)*, 779 F.2d 1068, 1071 (5th Cir. 1986); *Westbrook* v. *Albany Partners Ltd. (In re Albany Partners Ltd.)*, 749 F.2d 670, 675 (11th Cir. 1984) ("In finding a lack of good faith, courts have emphasized an intent to abuse the judicial process and the purposes of the reorganization provisions."); *In re Madison Hotel Assocs.*, 749 F.2d 410, 426 (7th Cir. 1984) (explaining that the good faith standard "is generally interpreted to mean that there exists a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code").[3]

---

[3] Petitioners also state that "the circuits are in hopeless analytical disarray as to the application of the standard to a debtor liquidating under Chapter 11" (Pet. 19), but do not cite any cases to support this proposition.

II. THE THIRD CIRCUIT APPLIED A SETTLED STANDARD TO A UNIQUE SET OF FACTS

The petition should also be denied because the judgment of the Third Circuit represents a routine application of the good-faith doctrine to the extreme facts of this case.

"[T]he requirement of good faith has been held to be an implicit condition to the filing and maintenance of a bankruptcy case for over a century." 7 *Collier on Bankruptcy* § 1112.07 (Lawrence P. King ed., 15th ed. rev. 1996).[4] It is well-settled, in the Third Circuit and the other courts of appeals, that determining whether the good-faith requirement has been satisfied is a "fact intensive inquiry" requiring an "examin[ation] of the totality of facts and circumstances." *SGL Carbon*, 200 F.3d at 162; *see also, e.g., Laguna Assocs. Ltd. P'ship* v. *Aetna Cas. & Sur. Co. (In re Laguna Assocs. Ltd.)*, 30 F.3d 734, 738 (6th Cir. 1994) (stating that an examination of good faith is "largely defined by factual inquiry" (internal quotations omitted)).

Based on the unique facts of this case, the court of appeals held that the Debtor ran afoul of the good faith requirement. There can be little doubt that this case presents extraordinary facts. The Debtor filed for bankruptcy even though it was not in financial distress, with more than $100 million in cash and (besides its debt to the Landlord) debts of less than $500,000. In addition, the Debtor filed without a bankruptcy purpose: it is undisputed that the Debtor was

---

[4] The Bankruptcy Code expressly requires that the plan of reorganization be "proposed in good faith." 11 U.S.C. § 1129(a)(3). Moreover, though "good faith" is not one of the factors specified in 11 U.S.C. § 1112(b), which allows the court to dismiss or convert a Chapter 11 petition "for cause," courts have agreed that the factors are not exhaustive, and that the absence of good faith constitutes "cause" for dismissal under 11 U.S.C. § 1112(b). *See, e.g., Trident Assocs. Ltd. P'ship* v. *Metropolitan Life Ins. Co. (In re Trident Assocs. Ltd. P'ship)*, 52 F.3d 127, 130 (6th Cir. 1995); *Marsch* v. *Marsch (In re Marsch)*, 36 F.3d 825, 828 (9th Cir. 1994); *Humble Place Joint Venture* v. *Foray (In re Humble Place Joint Venture)*, 936 F.2d 814, 816 (5th Cir. 1991); *First Nat'l Bank of Sioux City* v. *Kerr (In re Kerr)*, 908 F.2d 400, 404 (8th Cir. 1990); *Phoenix Piccadilly, Ltd.* v. *Life Ins. Co. (In re Phoenix Piccadilly, Ltd.)*, 849 F.2d 1393, 1394 (11th Cir. 1988).

not attempting to reorganize, and there was no need for liquidation because the business was already liquid. Indeed, the Debtor's own Board minutes—which the court of appeals referred to as a "smoking gun" (Pet App. 41a)—reveal that the sole purpose for the filing was to frustrate the Landlord's claim.

Judges Ambro and Rendell, dissenting from the denial of the petition for rehearing en banc, specifically recognized the unique facts of this case, cutting to the gravamen of why this Court should deny certiorari: "the panel's opinion is limited to its snow in August facts." Pet. App. 78a; *see also id.* (noting the "unique facts this case presents").

Because the Third Circuit merely applied the well-established test for good-faith filings to the unusual and egregious facts of this case, its decision does not warrant this Court's review.

III. THE DECISION BELOW IS CORRECT

The Third Circuit reached the correct result in this case. As the Third Circuit has stated, courts must "patrol[]" the boundary between good and bad faith in order to ensure that the bankruptcy process is not used to "destroy and undermine the legitimate rights and interests" of others. *SGL Carbon*, 200 F.3d at 161 (internal quotations omitted); *see also Furness* v. *Lilienfield*, 35 B.R. 1006 (D. Md. 1983) ("The good-faith requirement provides courts with the necessary tool to circumvent a petitioner's attempt to commit fraud upon the court.").

To determine if a bankruptcy petition was filed in good faith, a court must conduct a fact-intensive inquiry and determine whether the petition serves one of the underlying purposes of the Bankruptcy Code. While these purposes are sometimes articulated in slightly different ways,[5] the Third

---

[5] *See, e.g.*, H.R. Rep. No. 95-595, at 10 (1977) ("The present purposes of the Bankruptcy Act are twofold: either to rehabilitate financially a distressed debtor or to assemble and liquidate his assets for distribution to creditors." (footnote omitted)); *see also Bank of Am. Nat'l Trust & Sav. Ass'n* v. *203 N. Lasalle St. P'ship*, 526 U.S. 434, 453 (1999) (identifying two basic purposes of Chapter 11 as "preserving going concerns" and "maxi-

Circuit correctly concluded that there was no proper bankruptcy purpose for this filing. As noted above, it is undisputed that there was no intent to reorganize in this case, and there was no need to liquidate, as the Debtor's assets were already liquid. Moreover, as the Third Circuit held, the Debtor—which had more than $100 million in cash and negligible debts—was not even in financial distress within the meaning of the bankruptcy laws. Finally, the Debtor did not seek to maximize value for the benefit of creditors, but rather sought solely to obtain tactical advantage in its dispute with the Landlord and benefit its own shareholders at the Landlord's expense. In short, the Debtor's bankruptcy filing accomplished *nothing* other than frustrating the Landlord's claim. It was only on those extraordinary facts that the Third Circuit found that no valid bankruptcy purpose was served by the Debtor's filing.

Nor is there merit to petitioners' remaining claims of error. Faced with the court of appeals' proper application of settled law to the extreme facts of this case, petitioners strain to argue that the Third Circuit's decision represented a radical departure from existing law. Those contentions are meritless. First, petitioners contend that the Third Circuit erred by holding that a solvent entity is not permitted to file for bankruptcy, in contravention of the plain language of the Bankruptcy Code. Pet. 20-22. That is simply not so. To the contrary, the Third Circuit expressly acknowledged that "a debtor need not be insolvent before filing for bankruptcy protection." Pet. App. 24a. The Third Circuit merely followed the lead of many past decisions in that circuit and others recognizing that a financially healthy debtor—who is not in need of the bankruptcy remedy—is not ordinarily entitled to bankruptcy protection. *Id.* at 23a; *see, e.g.*, *SGL Carbon*, 200 F.3d at 166 ("Courts, therefore, have consistently dismissed Chapter 11 petitions filed by *financially healthy* companies with no need to reorganize under the protection

---

mizing property available to satisfy creditors"); *Toibb* v. *Radloff*, 501 U.S. 157, 163-164 (1991) (pointing to "the congressional purpose of deriving as much value as possible from the debtor's estate").

of Chapter 11." (emphasis added)); *Connell* v. *Coastal Cable T.V., Inc. (In re Coastal Cable T.V., Inc.)*, 709 F.2d 762, 764 (1st Cir. 1991) (Breyer, J.) ("To meet the 'good faith' requirement ... many courts have held that a reorganization plan must bear some relation to the statutory objective of resuscitating a *financially troubled* corporation." (emphasis added)); *Baker* v. *Latham Sparrowbush Assocs. (In re Cohoes Indus. Terminal, Inc.)*, 931 F.2d 222, 228 (2d Cir. 1991) ("Although a debtor need not be *in extremis* in order to file such a petition, it must, at least, face such financial difficulty that, if it did not file at that time, it could anticipate the need to file in the future.").[6]

Similarly, petitioners accuse the Third Circuit of allowing its own view of the equities to "negate" the "plain language" of the Bankruptcy Code's provision capping landlords' damages claims. Pet. 23-24. But that analysis begs the threshold question of good faith. If a petition is filed in bad faith, the Bankruptcy Code's limitations on the rights of creditors are not "negated"—they never come into play at all. The Bankruptcy Code's restrictions on creditors' nonbankruptcy rights benefit only debtors with a proper bankruptcy purpose—not any entity who wants to make use of them to serve some purpose unrelated to the objectives of bankruptcy law.

Finally, petitioners contend that the Third Circuit erred by failing to realize that "distribution" of assets, without more, is a valid bankruptcy purpose, and suggests that the decision below will prevent many debtors from filing liquidating Chapter 11 plans. Pet. 24-28. That too is incorrect. As the Third Circuit recognized, liquidating plans are expressly permitted by Chapter 11. An orderly liquidation—

---

[6] Petitioners' contention (Pet. 22) that the Debtor was "in economic distress"—meaning, according to petitioners, that it was out of business and no longer bringing in cash—misses the point. That kind of "economic distress" bears no relationship to the purpose of the bankruptcy laws. As the Third Circuit explained—and as petitioners do not dispute—"[t]he failure of [the Debtor's] business did not subject the company to any pressure on the value of its assets that could be reduced or avoided in an orderly liquidation under Chapter 11." Pet. App. 30a.

either by the sale of the debtor as a going concern or the sale of the debtor's individual assets—can serve the valid purpose of maximizing the value of the estate's assets in a way that would not be possible outside bankruptcy.[7] But the plan in this case, properly understood, was not a "liquidating" plan at all—all of the Debtor's assets had already been reduced to cash, and there was thus nothing to "liquidate." The distribution of an already liquid pile of cash does not require a bankruptcy filing. Accordingly, naked "distribution," without more, is not a valid bankruptcy purpose, and it cannot justify the use of the Bankruptcy Code for the sole purpose of relieving the debtor of a debt it could easily pay.

In the end, petitioners' contentions reduce to the untenable theory that any time a debtor seeks to take advantage of the provisions of the Bankruptcy Code, the requirement of good faith is satisfied. But, as the Third Circuit recognized, that position saps the good-faith requirement of all meaning, since *all* debtors file for bankruptcy in order to take advantage of the provisions of the Bankruptcy Code. "Just as a desire to take advantage of the protections of the Code cannot establish *bad* faith as a matter of law, that desire cannot establish *good* faith as a matter of law. Given the truism that every bankruptcy petition seeks some advantage offered in the Code, any other rule would eviscerate any limitation that the good faith requirement places on Chapter 11 filings." Pet. App. 38a. Indeed, if the good-faith filing requirement is met on these facts, it could be met in virtually any case. The Third Circuit properly held to the contrary, and nothing in its unexceptional decision justifies this Court's review.

---

[7] Petitioners' suggestion (Pet. 10) that the Third Circuit imposed a requirement that the debtor be sold as a going concern in order to be eligible to liquidate is thus unfounded. Clearly a debtor may also liquidate by selling its assets piecemeal. Here, however, there were no illiquid assets to liquidate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SETH P. WAXMAN
Counsel of Record
CRAIG GOLDBLATT
CHRISTOPHER J. MEADE
DANIELLE SPINELLI
BRENT BICKLEY
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

MAY 2005